Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules to Provide for Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz	:	PR Docket No. 93-35 RM-7986

To the Commission:

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth") and its subsidiary, Mobile Communications Corporation of America ("MobileComm"),[1] by its attorneys, herewith submit comments in response to the Commission's Notice of Proposed Rulemaking[2] in the above-captioned proceeding, and show, for the following reasons, that the Commission should address questions of equity and fairness facing all paging providers or reject the proposal, and that, should any form of the proposal be accepted, fair and equitable allocation procedures be adopted for the assignment of any exclusive paging channels.

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[1]MobileComm is a provider of both Radio Common Carrier (RCC) and Private Carrier Paging (PCP) services.

[2]In the Matter of Amendment to the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz ("NPRM"), PR Docket No. 93-35, RM-7986, released March 31, 1993.

BACKGROUND

The NPRM follows a petition for rulemaking filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("NABER") seeking channel exclusivity for private carrier paging ("PCP") systems[3] meeting certain proposed criteria. Generally, PCP systems supported the proposal, although several questioned its necessity.[4] Several parties opposed NABER's petition asserting that there was no showing of frequency congestion in the 900 MHz band; that the proposal would, of itself, grant nationwide exclusivity to six existing PCP systems; and that the proposal would encourage the warehousing of channels, frustrating new entry by competing paging services.[5] MTel, one of the proposal's opponents, also argued that the channel exclusivity violated Section 332 of the Communications Act by eliminating the "last functional distinction" between private and common carrier paging systems.[6]

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[3]The Commission has described these systems thusly: "the term 'private carrier paging' is intended to encompass both commercial and non-commercial private paging channels above 900 MHz, as well as paging-only channels at 150 and 460 MHz in the Business Radio Service." NPRM at para. 1, n.2.

[4]See NPRM at paras. 11 and 12.

[5]See NPRM at para. 13. Opposition comments were filed by Mobile Telecommunications Technologies Corporation ("MTel") and Dial Page.

[6]See NPRM at para. 16, n.33. See also Comments of MTel at 15-16.

The Commission embraces MABER's proposal for channel exclusivity for PCPs in its NPRM, with certain modifications. The Commission proposes that PCP systems with six or more transmitters be entitled to channel exclusivity; and that channel exclusivity also be available on a regional and national basis with correspondingly larger numbers of transmitters. Exclusivity, under the proposal, would be implemented on 35 of the 40 private paging channels, but would be available only to those licensees who construct their systems within eight months of licensing. Existing systems, however, would be eligible for immediate exclusivity if the Commission's criteria were met. All other existing systems would be grandfathered. The Commission refused to address MTel's contention that channel exclusivity violates Section 332 of the Act and necessitates Commission review of differing regulations pertaining to private and common carriers. The Commission asserts, "Such an inquiry, if appropriate, is beyond the scope of this proceeding." NPRM at para. 16, n.33.[7]

[7]The Commission also reasoned, with regard to Section 332, that "our proposal...differs from our rules governing common carrier paging in several key respects. Second, the legal distinction between private and common carriage does not turn on whether frequency assignments are exclusive or shared." Id.

FAILURE TO EXAMINE THE VARYING RULES APPLICABLE TO PRIVATE AND COMMON CARRIER PAGING IS UNREASONED DECISIONMAKING

The Commission's substantial acceptance of NABER's proposal is another in a series of bureaucratic steps which make indistinguishable private and common carrier paging.[8] Yet, the Commission refuses to examine, as a part of this evolution, the differing rules and regulations applicable to each. Its declaration that such an inquiry "is beyond the scope of this proceeding" begs the essential question.

The Commission has acknowledged in another proceeding--a proceeding like this one, where a piece-meal step to make private and common carrier paging indistinguishable is proposed--[9] that "the rapid growth in demand for paging services suggests that individual users would benefit from being able to choose between private and common carrier paging alternatives. [A]llowing individual access to PCP services would remove an unnecessary barrier to the ability of PCP systems to compete in the paging marketplace." (Emphasis added) Id., para. 7. In this very

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[8]The Commission has been wont to take similar steps in other private radio matters; as it acknowledges in this proceeding, "we are also considering the option of allowing licensees to obtain short-spaced separations based on an appropriate showing. We have adopted such an approach in licensing SMRs...." Id., para. 23, n.37. As BellSouth and other commenters have stated elsewhere, the evolution of the SMR regulatory climate is a salient example of what the Commission is proposing in this and other proceedings.

[9]See In the Matter of Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, PR Docket No. 93-38, RM-8017, Notice of Proposed Rulemaking, released March 12, 1993.

proceeding, the Commission reiterates its design: "As always, our goal is to create a competitive mobile communications marketplace." NPRM, para. 27. In other words, the Commission seeks to aid PCP competition in the paging marketplace by easing certain restrictions applicable to PCP providers; but it deems beyond the scope of this proceeding an examination of its own rules and regulations which saddle common carrier paging providers with extraordinary regulatory burdens. If the Commission considers it important to relieve PCPs from "unnecessary barriers" in order to "compete fully" in the paging market, it must also consider the effect of this lessened competition on common carriers who remain burdened by perhaps unnecessary regulatory baggage, such as varying power requirements and specific utility taxes.

Marketplace and competitive considerations cannot be considered piecemeal. Fairness and equity dictate a balanced approach. Otherwise, competition may actually be diminished. Moreover, the Commission must take "a 'hard look' at the salient problems,"[10] and thereafter treat similarly situated licensees in the same manner.[11] To do

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[10] Greater Boston Television Corporation v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

[11] Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

otherwise is an exercise in unreasoned decisionmaking and is flawed.[12]

THE COMMISSION HAS SHOWN NO PRACTICAL NECESSITY FOR THE REQUESTED AMENDMENT

There is no evidence of record indicating spectrum congestion in the 900 MHz band; in fact, the evidence is to the contrary.[13] The truth is, the PCP channels are only marginally utilized. The premise that exclusivity will ease congestion in the future is not supported by any capacity projections. Moreover, if transmission speeds continue to increase as they likely will--say, from 512 or 1200 bits to 6000 bits per second--capacity on the marginally used PCP channels may very well quadruple.

Further, there is no evidence that channel exclusivity will actually increase competition. Exclusivity will actually prevent or make less likely the entrance of many potential operators. The Commission itself recognizes that on a national and regional basis, the proposed rules will "lead to immediate frequency protection for no more than six nationwide networks and nine regional networks." NPRM, para. 35, n.52. Moreover, the Commission's proposal is actually discriminatory among PCP operators: exclusivity would be available only to operators in the 900 MHz band,

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[12] Greater Boston television Corp. v. FCC, supra.

[13] See Pagenet Comments at 2; PageMart Reply Comments at 3. See NPRM at para. 17: "[E]xclusivity should be implemented sooner rather than later, notwithstanding the relative lack of crowding on 900 PCP channels at present."

while those pioneering PCP operators on VHF and other bands would not profit from any advantages accruing from exclusivity. On the other hand, there is no evidence that the lack of exclusivity to this point has discouraged several operators from investing in and developing local and extended area services on bands other than 900 MHz.

Since the Commission's proposal is internally inconsistent and is not likely to effectuate its own stated goals, its effectuation should be reconsidered, and its implementation rejected.[14]

IF THE COMMISSION DECIDES TO ADOPT THE PROPOSAL, IT MUST IMPLEMENT A FAIR AND RATIONAL PROCEDURE FOR THE ALLOCATION OF EXCLUSIVE PCP CHANNELS

The Commission has stated that its goal is to encourage competition in the paging marketplace. In order to accomplish this goal in the context of this proceeding, the Commission should establish allocation goals which are fair and equitable to all paging interests. Thus, the list of frequencies available for exclusivity should be made public, and all existing paging companies should be given a chance to compete for the licenses. It is reasonable to assume that the proposal may give PCP providers an unfair competitive advantage, considering the regulatory burdens to which common carrier paging providers are subject. Protecting particular interests from competition is not

[14]See Greater Boston Television Corp. v. FCC, supra; Meredith Corporation v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

ordinarily an appropriate public policy objective;[15] and there is no reason put forward in this proceeding to make an exception to this principle.

CONCLUSION

For the foregoing reasons, BellSouth and MobileComm respectfully suggest that the Commission address the questions of equity and fairness among all paging providers that the proposed rule amendment engenders; failing that, the proposal should be rejected. Assuming the Commission does go forward with the rule, however, a fair and equitable allocation procedure must be implemented.

Respectfully submitted,

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May 6, 1993

[15] See Brunswick Corp. v. Pueblo Bowl-O-Matic, 429 U.S. 477 488 (1977).

CERTIFICATE OF SERVICE

I, Evelyn T. Craig, do hereby certify on this 6th day of May, 1993, that I have caused a copy of the foregoing Comments of BellSouth Corporation to be served, via first class United States mail, postage prepaid, to:

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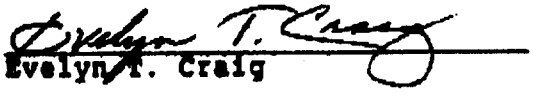

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